# January 23, 2014

# Additional LS Power Comments re: Designated Entity Agreement:

1. Financing Party Protections. As part of the comments submitted by LS Power regarding the draft Designated Entity Agreement (DEA) on December 3, 2013, LS Power proposed that certain language be added to Section 11 of the DEA ("Assignment") in order to confirm that the DEA could be assigned to a financing party and that the financing party would have certain additional protections, such as the right to receive notices to default and an opportunity to cure defaults.

   Having considered the concerns expressed by PJM, LS Power wishes to provide a further explanation of the provisions it continues to believe need to be included in the DEA in order to support all financing options for a project, while retaining PJM's rights with regard to project sponsor qualifications and project reassignment:

   (a) Acknowledgment of Lien/Security Interest. In a typical project financing, the project debt will be secured by a lien or security interest on all of the project assets, including all key contracts. Both the project owner and the lender will be interested in knowing that the granting of this lien or security interest will not, in and of itself, be viewed by counterparties as a breach of the underlying contracts, and LS Power thinks it would be appropriate for the DEA to expressly permit the granting of the lien/security interest (or contain a simple acknowledgment to the effect that such a lien/security interest will not be a breach of the DEA). By receiving a lien or security interest in a contract, the lender does not (i) have the right to force the contract to be assigned to the lender or anyone else or (ii) acquire any other rights under the contract. In a foreclosure scenario, the actual assignment of the contract would be governed by the terms and conditions of the contract and in the case of the DEA could occur only to the extent permitted by Section 11 of the DEA (see point (d) below).

   (b) Notices of Default. In the event PJM determines that a default has occurred, it will be important to project lenders that they receive written notice of the default from PJM at the same time that the Designated Entity receives notice.

   (c) Opportunity to Cure. In the event the project lenders were to receive a notice of default from PJM, they would immediately consult with the project owner and assess the viability of the cure plan or other course of action proposed by the project owner. While often the project lenders will in this type of situation conclude that the project owner is in the best position to take action to cure the default, it will be essential to the lenders that (i) they have the right to take independent corrective action in the event they are for whatever reason not satisfied with actions being taken by the project owner and (ii) if the lenders are successful in addressing the issues giving rise to the default (in accordance with the terms of the DEA), such performance will be accepted as a cure of the default. While it is not unusual for project lenders to ask counterparties to provide the lenders with extended cure periods and other rights that go beyond the rights given to the project owner in the underlying contract, LS Power appreciates PJM's view that the financing of a project should not create any enhancement of rights (or diminution of obligations) relative to the rights and obligations contained in the DEA executed by the project owner or the PJM tariffs, and therefore LS

Power would propose that financing parties be asked to accept the cure rights and other provisions contained in the DEA on an as-is basis.

(d) Consent to Assignment. If an event of default were to occur under the project financing agreements, then, in the highly unlikely event the project owner were unable to cure the default and the lenders elected ultimately to foreclose on their collateral, the lenders would look to take over ownership of the project assets and the DEA, and at that point would want the DEA to be assigned by the project owner to the lenders (or a third party purchaser of the assets). For this reason, in the comments to the DEA provided by LS Power on December 3, LS Power included language whereby the contract could be assigned to a financing party without PJM's consent. While this type of unfettered consent right in favor of a lender is not unusual in project finance transactions, LS Power appreciates the concerns expressed by PJM with respect to this language – i.e., that a provision permitting assignment to a financing party without further PJM action would effectively eliminate the discretion granted to PJM to evaluate whether a particular entity is qualified to own and operate the project in question. ***In light of this concern, LS Power is prepared to drop its request that assignment of the DEA be permitted without PJM approval and would instead propose that assignment of the DEA to financing parties be permitted to occur only with PJM consent. LS Power further suggests that, consistent with the language regarding discharge of obligations in the last sentence of the current version of Section 11 of the DEA, the DEA provide for such consent "not to be unreasonably withheld, conditioned or delayed" – as lenders will want to know that the PJM approval process is not an arbitrary one.***

LS Power appreciates PJM's consideration of these proposed changes to the DEA.

2. Proposed Changes to Section 8 of DEA. LS Power proposes the following changes to Section 8 of the DEA:
    a. Under the current draft of the DEA, if a Force Majeure event occurs but cannot be alleviated by the Designated Entity, PJM would have the right to terminate the DEA once the Designated Entity is prevented from "satisfying its obligations" under the DEA. Since the Designated Entity's obligations include meeting each of the development milestones on Schedule C to the DEA, LS Power is concerned that this language could be read to permit termination of the DEA in cases where there is a Force Majeure event that the Designated Entity has not yet alleviated but causes the Designated Entity to miss one of the pre-completion milestones on Schedule C, which LS Power does not believe is consistent with the intent behind the Section 8 language. Consistent with other provisions in the current draft of the DEA, LS Power proposes that this language refer instead to a failure (or expected failure) to achieve the Required Project In-Service Date. Specifically, in clause (iii) of Section 8, it is proposed that the phrase "which prevents the Designated Entity from satisfying its obligations under the Agreement" be replaced with "which has resulted in, or is reasonably expected to result in, the Project failing to achieve full operation by the Required Project In-Service Date".
    Section 8.1 currently provides that the DEA "shall terminate" in the event a Party is in Default under the DEA. This is inaccurate, inasmuch as other provisions of the DEA dealing with Default do not provide for the DEA to automatically terminate in such instances. Rather, the non-Defaulting Party can elect in such cases to terminate the DEA.

To address this point, LS Power proposes that the lead-in language language be changed to: "This Agreement may be terminated by the non-Defaulting Party in the event a Party is in Default…." – which LS Power believes is consistent with PJM's intent.

3. Coordination with CIA. Language should be inserted in the DEA to ensure coordination between the DEA and proposed CIA. For example, a breach or declaration of force majeure by a party other than the DE under to the CIA could result in the DE being unable to meet milestones in the DEA. Such action should not result in a Breach of the DEA under Article 7, or Article 8.